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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1375

FEDERAL COMMERCE &
NAVIGATION COMPANY, LTD.,

Petitioner,

v.

THE M/V MARATHONIAN, her engines, etc., and
EUROPA SHIPPING CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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EUROPA SHIPPING CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Federal Commerce & Navigation Company, Ltd. ("Federal") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered December 29, 1975.

Opinions Below

The opinion of the Court of Appeals has not as yet been reported, but is printed herein at 21a.[1] That Court affirmed the decision of the United States District Court for the Southern District of New York (Cannella, D.J.) reluctantly dismissing the complaint, and urging that the

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[1] References followed by "a" are to pages of the Appendix to this Petition.

matter be resolved by the appellate courts. The opinion of the District Court is reported at 392 F.Supp. 908, and is printed herein at 4a.

Jurisdiction

The jurisdiction of the District Court was invoked pursuant to the Admiralty Clause of the Constitution (Article III, Section 2, Clause 3), § 1333 of Title 28 U.S.C. (the Judicial Code), and Rule 9(h), F.R.Civ.P.

The judgment of the Court of Appeals for the Second Circuit was entered December 29, 1975.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

Questions Presented

1. Is the Court of Appeals for the Second Circuit in error in declining to allow recoveries for negligent acts causing foreseeable financial losses to parties other than the owners of property physically damaged as a result of such acts, or are the Courts of Appeals for the Seventh[2] and Ninth[3] Circuits in error in allowing such recoveries on the ground that *Robins Dry Dock & Repair Co.* v. *Flint*[4] has no further validity, in light of the material advances made in tort law since *Robins* was decided almost a half century ago? (Here, Petitioner Federal was Time Charterer of the M.V. ROLWI and sustained serious financial

[2] See *Chicago and Western Indiana R.R. Co.* v. *The Buko Maru*, 505 F.2d 579 (7th Cir. 1974), affirming 348 F.Supp. 549 (decision on merits) and unreported decision on damages, printed herein at 25a (N.D.Ill. 1972).

[3] *Carbone* v. *Ursich*, 209 F.2d 178 (9th Cir. 1953).

[4] 275 U.S. 303 (1927).

loss when it was deprived of the use of that vessel as a consequence of a collision brought about by the negligence of the M.V. MARATHONIAN, owned by Respondent Europa Shipping Corporation ("Europa").

2. Did the courts below err in failing to read the allegations of the complaint as sufficiently broad to encompass negligence of the Europa's M.V. MARATHONIAN so gross as to amount to intentional interference with the contractual relations of Petitioner Federal, as Charterer of the M.V. ROLWI, with that vessel's owner?

Statement

The complaint alleged that Federal was Time Charterer of the ROLWI (later renamed DOBERG); that while the ROLWI was operating under the Time Charter, the MARATHONIAN collided with her in Lake Michigan, causing serious damage, "as a result of which [Federal] lost the use of the M.V. ROLWI for an extensive period of time" (1a-2a); that the collision was caused "in particular by the operation of the [MARATHONIAN] at a highly excessive rate of speed in dense fog" (2a), and that as a result Federal sustained damages of approximately $700,000, representing its loss of the use of the ROLWI.

Europa answered and moved, pursuant to Rule 12(b)(6), F.R.Civ.P., for an order dismissing the complaint on the ground it failed to state a claim against Europa and the MARATHONIAN upon which relief could be granted. On April 8, 1975, the District Court granted the motion and directed the entry of judgment dismissing the complaint (4a). Judgment was accordingly entered April 23, 1975 (19a).

The District Court agreed with Federal's position that where, as in the present case, a party other than the owner

seeks a recovery for loss of use of property because of the negligent act of a third party, his claim should be governed, not by the doctrine of interference with contractual relations, which is actionable only when the interference is intentional, but rather by modern tort principles of negligence, causation and foreseeability. However, the District Court was constrained to dismiss Federal's complaint on the authority of *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303 (1927),[5] wherein a time charterer was denied a recovery for loss of use of the time chartered vessel resulting from damage to the vessel caused by a dry dock owner's negligence (4a).

As stated, Federal's complaint was dismissed reluctantly, the District Court stating that were it "now free to write upon a *tabula rasa* and not constrained by the weight of precedent, [it] would reject the negligent interference with contract doctrine in favor of a negligence-causation-foreseeability analysis. . ." (13a). In fact, given its "own attitude concerning the propriety of the *Robins* rule", the District Court "*urge[d] the appellate courts to resolve the matter and provide direction to the district courts for the resolution of this and other similarly situated controversies*". (16a).[6]

The Court of Appeals recognized that Federal's action had been "reluctantly dismissed" by the District Court. (22a). Moreover, the Court of Appeals itself acknowledged that Federal's contention "that *Robins* is unsound, has been eroded and should not be followed" was indeed "somewhat more substantial [than the allegation of intentional wrongdoing]". (22a). The Court conceded that

[5] Reversing 13 F.2d 3 (2d Cir. 1926), which affirmed 1924 A.M.C. 740 (S.D.N.Y. 1924) (not officially reported).

[6] Emphasis throughout has been added.

"*the basis for denial of relief to the time charterer in Robins has come under strong scholarly criticism*" (22a), saying that "[*i*]*f free to do so, we might question whether at least the damage to the principal time charterer is not so reasonably to be expected as to justify recovery.* See *Petition of Kinsman Transit Co.*, 388 F.2d 821, 823-24 (2d Cir. 1968)". (23a). In the present case, Federal *was* the principal time charterer; no subcharterers were involved.

However, as did the District Court, the Court of Appeals felt bound, in light of *Robins*, to apply the negligent interference with contract doctrine to the specific case of a time charterer seeking a recovery for his loss of use of the chartered vessel resulting from damage to the vessel caused by a third party's negligence. It therefore affirmed the judgment dismissing the complaint, observing that it is this Court which "should retain the exclusive privilege of overruling its own decisions . . .". (23a).

REASONS FOR GRANTING THE WRIT

I.

The Courts Below Erred In Declining to Follow Modern Tort Principles Recognizing a Right of Recovery For Negligent Acts Foreseeably Causing Financial Loss to a Party—Here a Time Charterer—Other Than the Owner of the Property Damaged—Here the Chartered Vessel—As a Result of Such Acts.

In *Robins, supra,* on the authority of which the motion to dismiss was granted, a vessel was operating under a time charter containing an "off hire" clause providing that in the event of a breakdown the vessel was to be "off hire" during the time lost, *i.e.*, the charterer was to be

under no obligation to pay hire during that time. While in drydock the chartered vessel was damaged as a result of the dry dock company's negligence and she lost 14 days in effecting the necessary repairs. While the vessel remained off hire during the 14 days, the savings in hire did not make the time charterer whole, as the value of the use of the vessel had risen substantially since the making of the charter. The time charterer therefore sought to hold the dry dock company liable for the profits lost by reason of the delay.

The District Court for the Southern District of New York (Goddard, D.J.) allowed the charterer a recovery on the ground that it had a "property right" in the vessel, even though the charter was admittedly not a demise (bareboat) charter, but a time charter whereunder the shipowner was to remain in possession and control of his vessel during the charter term. 1924 A.M.C. 740 (not officially reported).

On appeal, the Court of Appeals for the Second Circuit (Ward, C.J.) disagreed that the time charterer had such a property right, but nevertheless affirmed the District Court's decision on the ground that if the entire loss occasioned by the detention of the vessel were recovered and divided, a part of the recovery would accrue to the time charterer, *i.e.*, the shipowner would have been a trustee for the time charterer to the extent of the latter's share in the recovery, and that hence no injustice would result from allowing the time charterer to recover its share in a direct action against the tortfeasor. 13 F. 2d 3.

This Court, however, reversed, Mr. Justice Holmes stating that "justice does not permit that the [tortfeasor] be charged with the full value of the loss of use unless there is some one who has a claim to it as against the [tortfeasor]." He went on to say that the time charterer had no claim either in contract or in tort and could not acquire a

standing to sue by the suggestion that if someone else had recovered he would have been bound to pay over a part of the recovery by reason of his personal relations with the charterer. In Mr. Justice Holmes' view, the damage to the vessel was not a wrong to the time charterer, but only to the shipowner.

While *Robins* supports Europa's position, the law of torts has seen many changes since that case was decided nearly half a century ago, and one of the most significant of these is the broadening of the class of persons entitled to protection from the tortious acts of others. As a result, *Robins* has been repeatedly criticized by the leading modern authorities on tort law. See Harper and James, *The Law of Torts* 501-505 (1956 ed.); Prosser, *Torts* 940 (4th ed. 1971); James, Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal, 25 Vand. L. Rev. 43, 55-57 (1972); Harper, Interference with Contractual Relations, 47 Nw. U. L. Rev. 873, 884-893 (1953); Carpenter, Interference with Contract Relations, 41 Harv. L. Rev. 728, 740 (1928).

Typical of the critical analyses of the *Robins* rule is that of Harper and James, who state in *The Law of Torts, supra,* at 501-505:

> It is believed that many of the cases which purport to deal with this question and much of the literature which discusses them have misconceived the problem and have beclouded rather than clarified the issues. Indeed, in most instances, the problem of negligent interference with contract relations seems to be wholly artificial.
>
> Much of the confusion derives from the opinion of Justice Holmes in *Robins Dry Dock & Repair Company* v. *Flint*....

With the emphasis . . . laid on the wrongdoer's knowledge or lack of knowledge of the contract, discussion of the *Robins* case has invariably been cast in the mould of negligent interference with contract relations. It is submitted that the issue of "knowledge" has been largely overemphasized on the one hand, and is largely irrelevant on the other.

In the first place, if "knowledge" were important, it is hard to understand why defendant should not be charged with knowledge that the plaintiff was or might well be a charterer entitled to the use of the vessel which he delivered to the dry dock to be repaired under a contract which the defendant had made with the owner. And if it be argued that the defendant would assume that the master of the vessel was acting for and on behalf of the owners, it might be a sufficient answer that such an assumption is hardly warranted in an industry where charter parties are common and vessels are, perhaps as frequently as not, operated by persons other than their owners. "Knowledge" of the existence of the contract or lack of it could hardly be decisive if the general principles of negligence are applicable. It should be enough to establish a prima facie case if the defendant, as a reasonable man, should have known of the likelihood of the existence of the contract and thereafter created an unreasonable risk of interfering with it. The analogy to negligent injury to persons is clear. Not only is it negligent to create unreasonable risks to persons whose presence is known but to those whom the actor has reason to expect in the area of his conduct and who thus may be exposed to the risk.

More important, knowledge on the part of the defendant that the ship was being operated by persons other than the owners would seem to be irrelevant, as having

nothing to do with the defendant's primary liability. It is a long-standing rule of damages that recovery for damage tortiously caused to a chattel may include not only the cost of repairs but the value of the use of the chattel while it is undergoing repairs. A similar rule prevails in the case of damage to real estate which involves repairs and the loss of use. If there had been no charter party in the *Robins* case, there seems to be no doubt that the owner could have recovered for the loss of the vessel's use which resulted from the negligently damaged propeller. Again, if the damage had been done to the vessel while the charterer was in active operation of it, his recovery could be supported on analogy to old and unquestioned principles of law. The defendant should not be permitted to plead the jus tertii.

In a more recent article, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal,* 25 Vand. L. Rev. 43, 55-57 (1972), Professor James again challenged the present vitality of *Robins:*

> It remains to be considered whether the present rule may be too broad—whether its sweep may exclude liability in some situations to which the pragmatic objection has no valid application. Take, for example, the case of a ship's charterer who loses its use, and even may have to pay hire, during the time when the ship is laid up for repairs necessitated by defendant's negligence. If there were no charter, the owner who lost the vessel's use could recover for that loss measured by its reasonable value. If the defendant were liable to the charterer instead, it would not be a wide and open-ended liability, but a finite one that the tortfeasor or his liability insurer would expect to pay under frequently occurring circumstances. There

seems to be no valid reason why defendant should escape this ordinary item of damage just because the loss in this case happened to be suffered by one who had no proprietary interest in the ship. What has been called the pragmatic objection simply has no application. There are some practical—or "pragmatic"—difficulties, but they are of a different nature and a lower order of magnitude. There are questions of proper parties, of the proper measure of damages, of the protection of defendant against multiple vexation and double liability, and of protection of the settlement process. All these difficulties, however, are readily solvable by familiar procedural devices. The presence of both the charterer and owner as parties plaintiff in the suit could be required, and this would answer proper parties and multiple vexation questions. The measure of damages, in any event, should be limited to reasonable value. Settlement in good faith with either party should be held to bar the other on the very appropriate analogy from the law of bailment.

And in Prosser, *Torts* (4th ed. 1971) the author states, at 940:

> No very satisfactory reason has been given for this refusal of a remedy in negligence cases. For the most part the courts have talked of "proximate cause," and have said that the consequences were too "remote". In all of the cases denying recovery the defendant had no knowledge of the contractual relation and no reason to foresee any harm to the plaintiff's interests; and this has led some writers to conclude that they do not mean that no negligence action could ever be maintained, but merely that there was no duty to the plaintiff in the particular instance. While this is very persuasive, it seems more likely that the courts are

> deliberately refusing to protect any contract against negligence, influenced by fear of an undue burden upon freedom of action, the relative severity of the penalty which may be imposed upon mere negligence, the possibility of collusive claims and increased litigation, and the difficulty of apportioning damages. If this is true, the question may at least be raised whether such a policy is not too narrow, and whether, as in the somewhat analogous case of the liability of the contractor himself to third parties, the law may not be expected to move in the future in the direction of recovery by those whose damages are foreseeable by the actor.

The federal courts have tended to apply the same principles as those advocated by the authorities. Thus, in *Petition of Kinsman Transit Co., supra,* (hereinafter referred to as "Kinsman II"), cited by the Court of Appeals in its decision below, that Court expressly declined to apply the doctrine of negligent interference with contractual relations to a claim for loss of use of property owned by another and damaged by the negligent act of a third party. In that case a river became blocked by vessels which had negligently been permitted to go adrift. Another vessel, in which grain had been stored, was unable to reach the elevator where it was to discharge the grain and the grain company was required to purchase grain elsewhere in order to meet a contractual commitment. Still another vessel, which was discharging cargo, was struck by one of the drifting vessels, making it necessary to rent equipment in order to complete the discharge.

The District Court denied the claims of the grain company and the shipowner who had to rent the discharging equipment, on the ground that no recovery should be allowed for negligent interference with the contractual rights of another. The decision was affirmed, but on grounds

of non-foreseeability, and not on grounds of negligent interference with contractual rights. In referring to *Kinsman II* in his opinion in the case at bar, Judge Cannella observed that "[i]n the course of rejecting these claims on foreseeability grounds, Judge Kaufman cast doubt upon the vitality of the *Robins* holding . . ." (14a).

In *Kinsman II*, Judge Kaufman stated, at 388 F.2d 823-24:

> "Judge Burke [the Trial Judge] refused to confirm either the Gillies or the Farr awards made by the Commissioner. He reasoned that the evidence established that the damages to Cargill [the grain company] and Cargo Carriers [the shipowner forced to rent discharging equipment] were caused by negligent interference with their contractual relations. In the absence of proof that the interference was intentional or with knowledge of the existence of the contracts, he concluded recovery could not be grounded in tort. Robins Dry Dock and Repair Co. v. Flint. . . . We too deny recovery to the claimants, *but on other grounds.*
>
> "We do not encounter difficulty with Judge Burke's analysis because it lacks some support in the case law; instead, we hesitate to accept the 'negligent interference with contract' doctrine *in the absence of satisfactory reasons for differentiating contractual rights from other interests which the law protects.* . . . Professors Harper and James suggest that the application of the doctrine is wholly artificial in most instances. [Citing Harper and James, The Law of Torts, 501 (1956 ed.)] *We therefore prefer to leave the rock-strewn path of 'negligent interference with contract' for more familiar tort terrain.* Cargill and Cargo Carriers argue broadly that they suffered damage as a result of defendants' negligence and *we will deal with*

> *their claims in these terms instead of on the more esoteric 'negligent interference' ground.'"*

The courts in at least two other circuits have likewise openly challenged the *Robins* rule and, like the Second Circuit, have rejected its application in actions for the recovery of the loss of use of another's property resulting from negligent acts of third parties. Perhaps the most explicit departure from the *Robins* rule was that made in *Chicago and Western Indiana R.R. Co.* v. *The Buko Maru,* unreported decision on damages (printed herein at 25a), aff'd 505 F.2d 579 (7th Cir. 1974).

In *The Buko Maru,* several railroads operating under trackage agreements entitling them to use a bridge owned by another railroad sued to recover damages resulting from their loss of use of the bridge when it was struck by a vessel. Having found the vessel at fault, the District Court was called upon to determine the damage issues. Although the claim of the railroad owning the bridge was not disputed, the BUKO MARU's owner vigorously challenged the claims brought by three "proprietor" railroads which owned the stock of the bridge owning company, as well as the claims of three "tenant" railroads entitled to the use of the bridge under contracts with the other railroads.

At the very outset of its opinion, the District Court in *The Buko Maru* stated that "[t]he controlling rule of law . . . is whether the damages were reasonably foreseeable", a principle which, the Court added, "is laid down and thoroughly analyzed with respect to various categories of admiralty claims by Judge Friendly in *Petition of Kinsman Transit Co.* [*"Kinsman I"*] 338 F. 2d 708 (2d Cir. 1964), [*cert.* denied *sub nom. Continental Grain Co.* v. *City of Buffalo,* 380 U.S. 944 (1965)]." [27a]. Failing to comprehend why users of the bridge should be barred from

recovering damages sustained as the proximate result of the vessel's wrongful act, the Court held that the "proprietor" and "tenant" railroads, "as persons with a proprietary *or a contractual right* to use the bridge" were thus entitled to recover damages from the collision. (27a).

In so holding, the District Court in the *Buko Maru* by no means overlooked *Robins*. Indeed, the vessel's owners had argued for application of the *Robins* rule by relying on *Louisville & Nashville Railroad* v. *Arrow Transportation Co.*, 170 F. Supp. 597 (N.D. Ala. 1959), wherein the claims of a "tenant" railroad were rejected because, in the words of the *Buko Maru* Court, "[t]he court [there] found no 'proprietary' interest for recovery under [Title 46 U.S.C.] Section 740, purporting to follow Robins Dry Dock . . . and Alabama tort law". However, Judge McMillen in no uncertain terms rejected the *Louisville* decision (and the *Robins* principle followed therein), stating (29a):

> We do not believe this case is sound law today, at least in Illinois, in view of the rather dramatic advances in tort liability which have occurred since Justice Holmes found no liability for the negligent interference with unforeseen contractual relationships.

In *Carbone* v. *Ursich*, 209 F.2d 178 (9th Cir. 1953) the Court of Appeals for the Ninth Circuit likewise departed from the *Robins* rule, holding that fishermen who had contracted with the owners of a trawler for a share of the catch and who suffered monetary losses by reason of a collision caused by another vessel were entitled to recover from the latter's owners. See also *Akt. Cuzco* v. *The Sucarseco*, 294 U.S. 394 (1935); *Union Oil Co.* v. *Oppen*, 501 F.2d 558 (9th Cir. 1974); *In Re Lyra Shipping Co.*, 360 F.Supp. 1188 (E.D. La. 1973).

In *The Sucarseco, supra*, the owners of cargo shipped on a vessel which thereafter collided with another were held entitled to recover from the other vessel the amount of the contributions they were required to pay to the owners of the carrying vessel on account of general average expenses incurred by reason of the collision. This Court recognized that the right to recover was not based upon any physical injury to the cargo, but arose directly from the tort sustained by the Vessel with which the cargo interests had contracted for the carriage of their cargo.

Like the damages sustained by the "proprietor" and "tenant" railroads in *The Buko Maru, supra,* and the fishermen in *Carbone, supra,* but differing from the damages of the parties whose claims were rejected in *Kinsman II, supra,* Federal's loss in the present case was the clearly foreseeable consequence of the MARATHONIAN's negligent navigation.

If the ROLWI had been operated by her owners for their own account, it is settled law that they would have been entitled to their loss of profit during the detention period as part of their damages. See *The Aurora*, 64 F. Supp. 502 (E.D.La. 1945), aff'd 153 F. 2d 224 (5th Cir. 1946); *The Argentina* [1889] 14 A.C. 519 (H.L.). Such loss of profit would have been just as foreseeable a consequence of the MARATHONIAN's fault as would physical damage to the ROLWI. This Court will, we believe, take judicial notice of the fact that today the practice of operating vessels under time charters is a very common one,[7] and that time

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[7] For a discussion of the nature of a time charter, see *Damps. Dannebrog* v. *Signal Oil & Gas Co.*, 310 U.S. 268 (1940), wherein this Court notes that "this case of charters • • • has given rise to many questions in various situations".

charter rates fluctuate widely.[8] It was therefore plainly foreseeable that if the MARATHONIAN was navigated negligently she might collide with a vessel operating under a time charter, and that the time charterer might sustain damages because the market rate of hire at the time of the collision might be substantially greater than the "off-hire", if any, allowed at the charter rate during detention for necessary collision damage repairs. Recovery of Federal's damages for loss of contractual benefits would thus be fully warranted on grounds of foreseeability.

The trend toward allowing a recovery to one who has suffered economic loss as a result of negligent damage to the property of another is also evident in England. Thus, in *Spartan Steel and Alloys Ltd.* v. *Martin & Co. (Contractors) Ltd.*, 3 A.E.R. 557 (Court of Appeal 1972), Lord Denning, M.R., stated, in referring to the grounds upon which such losses had formerly been disallowed (*i.e.*, that in the particular circumstances no duty of care was owed to the plaintiff, or that his damages were too remote):

> I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable.

In the same case, a very persuasive dissenting judgment was delivered by Lord Justice Davies, who stated, at 3 A.E.R. 569:

> My conclusion, as already indicated, is that an action lies in negligence for damages in respect of pure economic loss, provided that it was a reasonably foreseeable and direct consequence of failure in a duty of care.

[8] N.Y. Times, Nov. 4, 1973, §3, at 13, col. 4; N.Y. Times, Nov. 20, 1973, at 61, col. 7; Shipping Statistics and Economics, No. 62 (H.P. Drewry [Shipping Consultants] Ltd. London), at 4 (December 1975).

Allowance of a recovery by Federal for the loss of its use of the ROLWI would be wholly consistent with the views expressed both by the Courts below and the leading commentators on tort law who have endorsed abandonment of the *Robins* rule in favor of the application of tort principles of negligence, causation and foreseeability.

II.

Even If This Court Should Find That the Robins Rule Remains Valid, It Should Not Have Been Applied In the Present Case, As the Complaint Alleges An Intentional Tort, and Not Mere Negligent Interference With Contractual Relations.

On familiar principles, for the purposes of a motion to dismiss the allegations of the complaint must of course be accepted as true. *Jenkins* v. *McKeithen*, 395 U.S. 411 (1969); *Gardner* v. *Toilet Goods Association*, 387 U.S. 167 (1967); *Kossick* v. *United Fruit Co.*, 365 U.S. 731 (1961), rehearing den. 366 U.S. 941; *Cooper* v. *Pate*, 378 U.S. 546 (1964). On equally well-settled principles, on such a motion the complaint must be viewed in the light most favorable to the plaintiff, and should not be dismissed unless it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim. *Conley* v. *Gibson*, 355 U.S. 41 (1957); *Dioguardi* v. *Durning*, 139 F. 2d 774 (2d Cir. 1944); *Knudsen* v. *The Torrington Company*, 254 F. 2d 283 (2d Cir. 1958), citing 2 Moore, *Federal Practice*, 2245 (2d Ed. 1948).

While in the instant case the Complaint does not allege that the MARATHONIAN deliberately ran the ROLWI down, it does allege that the MARATHONIAN was proceeding at a highly excessive rate of speed in dense fog. Viewing the complaint in the light most favorable to Plaintiff, as the District Court was required to do, the allegation is broad enough to include negligence so gross that Europa must be deemed to have intended its foreseeable consequences. Collision damage to another vessel and resulting economic loss to her time charterer were plainly foreseeable, and if Federal proves the facts alleged in the complaint, it should be permitted to recover damages for such economic loss.

CONCLUSION

For the Reasons Set Forth Above, the Petition For a Writ of Certiorari Should Be Granted.

Respectfully submitted,

NICHOLAS J. HEALY
Attorney for Petitioner
Federal Commerce & Navigation Company, Ltd.
29 Broadway
New York, New York 10006

HEALY & BAILLIE
EDWARD J. MILLER
Of Counsel

APPENDIX

Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 74-1899 (J.M.C.)

FEDERAL COMMERCE & NAVIGATION COMPANY, LTD.,
Plaintiff,

—against—

THE M/V MARATHONIAN, her engines, etc., and EUROPA SHIPPING CORPORATION, *Defendants*.

Plaintiff, FEDERAL COMMERCE & NAVIGATION COMPANY, LTD., by its Attorneys, Healy & Baillie, for its complaint against the M.V. MARATHONIAN, her engines, etc., and EUROPA SHIPPING CORPORATION, alleges:

1. This is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears, and is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure.

2. At all times hereinafter mentioned, Plaintiff FEDERAL COMMERCE & NAVIGATION COMPANY, LTD. was, and it still is, a corporation duly organized and existing under and by virtue of the laws of Canada, with an office and principal place of business at Montreal, P.Q., Canada, and was, and it still is, the Charterer of the M.V. ROLWI (renamed DOBERG) under a certain Time Charter dated January 21, 1970.

3. On information and belief, the M.V. MARATHONIAN will be within this District during the pendency of this action.

4. On information and belief, at all times hereinafter mentioned Defendant, EUROPA SHIPPING CORPORATION, was, and it still is, a corporation organized and existing under and by virtue of the laws of a foreign country, with an office and place of business c/o North Atlantic Shipping Agency, Ltd., Stone House, 128 Bishopsgate, London E.C. 2, England, and was, and it still is, the owner and operator of the M.V. MARATHONIAN.

Complaint

5. On or about October 2, 1973, while the M.V. ROLWI was operating under the aforesaid Time Charter, the M.V. MARATHONIAN collided with the M.V. ROLWI in Lake Michigan, causing serious damage to the M.V. ROLWI, as a result of which Plaintiff lost the use of the M.V. ROLWI for an extensive period of time.

6. The aforesaid collision was not caused or contributed to by any fault or negligence on the part of Plaintiff, but was caused in whole or in part by fault and negligence of Defendant, the M.V. MARATHONIAN, and those in charge of the said vessel, and in particular by the operation of the said vessel at a highly excessive rate of speed in dense fog.

7. As a result of the said collision, Plaintiff has sustained damages consisting of the loss of use of the M.V. ROLWI, and expenses incidental thereto, which, as nearly as can be estimated at present, will amount to approximately Seven Hundred Thousand ($700,000.00) Dollars, no part of which sum has been paid, although payment thereof has been duly demanded.

WHEREFORE, Plaintiff prays:

1. That process in due form of law, according to the practice of this Honorable Court, may issue against the M.V. MARATHONIAN, her engines, etc.;

2. That all persons claiming any interest in the said vessel may be required to appear and answer the aforesaid matters;

3. That process in due form of law according to the practice of this Honorable Court may issue against Defendant, EUROPA SHIPPING CORPORATION, citing it to appear and answer on oath the aforesaid matters;

4. That Plaintiff may have judgment for its damages, with interest and costs, against Defendant, EUROPA SHIPPING CORPORATION, and the M.V. MARATHONIAN;

Complaint

5. That the M.V. MARATHONIAN may be condemned and sold to satisfy Plaintiff's damages; and

6. That the Court may grant Plaintiff such other and further relief as the justice of the cause may require.

HEALY & BAILLIE
Attorneys for Plaintiff

By /s/ NICHOLAS J. HEALY
A Member of the Firm
29 Broadway
New York, N.Y. 10006
Tel. 943-3980

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

NICHOLAS J. HEALY, being duly sworn, deposes and says that he is a member of the firm of Healy & Baillie, Attorneys for Plaintiff herein; that he has read the foregoing Complaint and knows the contents thereof; that the same is true to the best of his knowledge, information and belief; that the reason why this verification is made by deponent, and not by Plaintiff, is that Plaintiff is a foreign corporation, no officer or director of which is now within this District; that the sources of his information and the grounds for his belief are documents in deponent's possession and conversations had with others.

/s/ NICHOLAS J. HEALY
Nicholas J. Healy

Sworn to before me this
30th day of April, 1974.
/s/ MARY M. KOSMERL
Notary Public

Memorandum Decision

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 74-1899 (J.M.C.)

[SAME TITLE]

MEMORANDUM DECISION

[Officially reported at 392 F.Supp. 908]

CANNELLA, District Judge

Upon the authority of Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927), the defendants have moved the Court for an order dismissing the complaint for failure to state a claim upon which relief can be granted.[1] As we find the decision in *Robins* controlling, the motion is hereby granted.

Accepting, as we must on motions of the instant nature, the allegations of the complaint as true, the facts giving

1. On October 15, 1974, the defendants interposed the instant motion and denominated it as one pursuant to Fed.R.Civ. 12(b)(6). It appears, however, from the files and records of this cause that prior thereto, on June 27, 1974, the defendants filed an answer to the plaintiff's complaint. Thus, a motion under Rule 12(b)(6) cannot properly lie because "A motion making any of these defenses shall be made before pleading. . . ." Fed.R.Civ.P. 12(b). However, as the Seventh Circuit has pointed out, "A motion to dismiss made after the filing of an answer serves the same function as a motion for judgment on the pleadings and may be regarded as one." Schy v. Susquehanna Corp., 419 F.2d 1112, 1115 (7 Cir.), cert. denied, 400 U.S. 826, 91 S.Ct. 51, 27 L.Ed.2d 55 (1970). Accordingly, we deem the instant motion to constitute one for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c) (or, alternatively, for summary judgment under Rule 56(b)). As Judge Clark stated in Central Mexico Light & Power Co. v. Munch, 116 F.2d 85, 87 (2 Cir. 1940), "Since the same relief is sought, the difference in name is unimportant."

Memorandum Decision

rise to this controversy are easily stated. At all times here relevant, the plaintiff, Federal Commerce & Navigation Co., was the time charterer of the M.V. ROLWI under a time charter dated January 21, 1970. On October 2, 1973, the M.V. ROLWI was involved in a collision on Lake Michigan with the M.V. MARATHONIAN, a vessel owned and operated by the defendant Europa Shipping Corporation. Plaintiff alleges that "[t]he aforesaid collision was not caused or contributed to by any fault or negligence on the part of Plaintiff, but was caused in whole or in part by fault and negligence of Defendant, the M.V. MARATHONIAN, and those in charge of the said vessel, and in particular by the operation of the said vessel at a highly excessive rate of speed in dense fog." (Complaint at ¶ 6.) It is further alleged in the complaint that as the result of this collision, "Plaintiff has sustained damages consisting of the loss of use of the M.V. ROWLI, and expenses incidental thereto, which, as nearly as can be estimated at present, will amount to approximately Seven Hundred Thousand ($700,000.00) Dollars. . . ." (Complaint at ¶ 7.)

To these facts, the Court's decision in *Robins* squarely applies. In *Robins*, a time charterer sued a drydocker to recover damages (loss of use and profits) arising from a delay in the release of the chartered vessel from drydock, such delay having been caused by the drydocker's negligent injury to the ship's propeller. Mr. Justice Holmes, after first rejecting the notion that a recovery might be had by the charterer under contract and third-party beneficiary principles, posed the question of the case in these terms: "whether the [charterers] have an interest protected by the law against unintended injuries inflicted upon the vessel by third persons who know nothing of the charter." 275

U.S. at 308, 48 S.Ct. at 135. To that question the Justice, writing for a unanimous Court, answered:

> Their loss arose only through their contract with the owners—and while intentionally to bring about a breach of contract may give rise to a cause of action [citation omitted], no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. [Citation omitted]. The law does not spread its protection so far.

Id. at 308-09, 48 S.Ct. at 135.

The Supreme Court's holding in *Robins* was later summarized by Judge Learned Hand in the following fashion:

> [The Supreme Court] thought that the only basis for charging the drydocker with liability was because he had prevented the performance of the charter-party by the promisor—the owner—and that interference by a third person with the performance of a contract was an actionable wrong only if it was intentional. The Court thought it irrelevant that this resulted in exonerating the drydocker from nearly all liability thorough the fortuity that the profitable use of the ship had been divided between the owner and the charterer: the difficulty went deeper; the drydocker had committed no legal wrong against the charterer at all, though he had caused it serious damage.

Agwilines, Inc. v. Eagle Oil & Shipping Co., 153 F.2d 869, 871 (2 Cir.), cert. denied, 328 U.S. 835, 66 S.Ct. 980, 90 L. Ed. 1611 (1946). Simply put, the rule of *Robins* is clear:

A time charterer (who is without any property right in the vessel)[2] cannot recover pecuniary losses sustained as the

2. As Mr. Justice Holmes aptly pointed out in fashioning the rule of *Robins*, a demise charter is not involved in the circumstances under consideration, and, therefore, the consequences of a property interest in the charterer need not be looked into. Professors Gilmore and Black indicate the distinctions between time and demise charters in the following terms:

> *The Time Charter.* In this form . . . the owner's people continue to navigate and manage the vessel, but her carrying capacity is taken by the charterer for a fixed time for the carriage of goods anywhere in the world (or anywhere within stipulated geographic limits) on as many voyages as approximately fit into the charter period. She is therefore under the charterer's orders as to ports touched, cargo loaded, and other business matters. The time charter is used where the charterer's affairs make it desirable for him to have tonnage under his control for a period of time, without undertaking the responsibilities of ship navigation and management or the long-term financial commitments of vessel ownership. The company operating regular liner service may, for example, find itself temporarily short of tonnage and wish to place another vessel in the service; it can do this with relatively slight trouble and without indefinitely long commitment if it can find a suitable vessel to take on time charter.
>
> *The Demise or Bareboat Charter.* In this form, the charterer takes over the ship, lock, stock and barrel, and mans her with his own people. He becomes, in effect, the owner *pro hac vice*, just as does the lessee of a house and lot, to whom the demise charterer is analogous. Obviously, such an arrangement is suitable to the needs of anyone who wants, for a time, to be in the position of the owner of a vessel, but who does not want to go to the expense and trouble of buying one or having one built. The demise, as well as the time charter, may answer the need of the shipping line temporarily short on tonnage; whether a company in this position wants to take a ship on time or on demise will depend on whether the advantages of the complete control enjoyed by the demise charterer seem, in the actual situation, to outweigh the rather heavy responsibilities that he assumes, as owner, in effect, for the time being.

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result of a third-party's negligent interference with the performance of the contract between the charterer and the vessel's owner.

Mr. Justice Holmes' decision in *Robins* and the principle of law established therein were followed by the Court of Appeals for this Circuit in the *Agwilines* case, *supra*, and this view has been consistently adhered to by other federal courts.[3] Contrary to plaintiff's assertion, *Robins* correctly

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G. Gilmore & C. Black, The Law of Admiralty § 4-1 at 194 (2 ed. 1975) (footnote omitted). *See also, id.* at § 4-20; W. Poor, American Law of Charter Parties and Ocean Bills of Lading § 7 at 25-26 (5 ed. 1968); G. Robinson, Handbook of Admiralty Law § 83 at 593-600 (1939).

3. *See, e.g.*, Kaiser Aluminum & Chem. Corp. v. Marshland Dredging Co., 455 F.2d 957, 958 (5 Cir. 1972) (*per curiam*); J. Ray McDermott & Co. v. S.S. Egero, 453 F.2d 1202, 1203-04 (5 Cir. 1972); Keene Lumber Co. v. Leventhal, 165 F.2d 815, 821-22 n. 4 (4 Cir. 1948); Rederi A/B Soya v. Evergreen Marine Corp., 1972 A.M.C. 1555, 1562-1566 (E.D.Va.1971); Dampskibsaktieselskabet Den Norske v. Italco Aluminum Corp., 306 F.Supp. 170, 176 (W.D. Wash.1969), aff'd, 457 F.2d 889 (9 Cir.), cert. denied, 409 U.S. 1024, 93 S.Ct. 466, 34 L.Ed.2d 316 (1972); Guarrasi v. Panama Canal Co., 271 F.Supp. 678, 680 (D.C.Z.1967); Henderson v. Arundel Corp., 262 F.Supp. 152, 159-60 (D.Md.1966), aff'd mem. 384 F.2d 998 (4 Cir. 1967); Shell Oil Co. v. S.S. Tynemouth, 205 F.Supp. 838, 839 (E.D.La.), vacated on other grounds, 211 F.Supp. 908 (E.D.La.1962); *and see* the commentaries contained in W. Poor, American Law of Charter Parties and Ocean Bills of Lading § 7 at 25 n. 3 (5 ed. 1968); G. Robinson, Handbook of Admiralty Law § 87 at 632-34 (1939). For a recent discussion of the law concerning negligent interference with economic expectancy, *see*, Union Oil Co. v. Oppen, 501 F.2d 558, 563-68 (9 Cir. 1974), wherein the court approvingly cites the decision in *Robins* at p. 564. *See also*, 88 Harv. L.Rev. 444 (1974). *Compare*, Borcich v. Ancich, 191 F.2d 392 (9 Cir. 1951), cert. denied, 342 U.S. 905, 72 S.Ct. 293, 96 L.Ed. 677 (1952) and Cusumano v. The Curlew, 105 F.Supp. 428 (D.Mass. 1952) *with* Carbone v. Ursich, 209 F.2d 178 (9 Cir. 1953) (wherein the Ninth Circuit overruled its earlier decision in *Borcich*). The English authorities are in apparent accord with the *Robins* view. *See*, W. McNair & A. Mocatta, Scrutton on Charter Parties and Bills of Lading 6 (17th ed. 1964).

reflects the present state of law concerning negligent interference with contract, as evidenced by the Restatement (Second) of Torts § 766B (Tent. Draft No. 14, 1969), which states in relevant part:

> (1) Except as stated in subsection (2) [concerning the negligent failure to transmit a telegraph message], and in the case of bodily harm to a servant, there is no liability for pecuniary harm caused by
>
> (a) negligent interference with the performance of a contract, or
>
> (b) negligently causing a third person not to enter into or continue a business or other advantageous relation with another.[4]

4. The Explanatory Notes to § 766B of the Restatement (Second) of Torts, Comment a, recite the rationale for the rule adopted by the Institute.

> Liability for interference with contracts, or with prospective contract relations, developed in the field of intentional torts. Thus far there has been very little recognition of any liability for such interference when it results from conduct which is merely negligent. The explanation usually given by the courts, when one is given at all, is that such harm is too "remote" for negligence liability, and that the defendant's conduct is not the "proximate cause." In most, if not all, of the cases in which recovery has been denied, the defendant has had no knowledge of the contractual or prospective relation, and no reason to foresee any harm to the plaintiff's interests; and the decision sometimes has been justified under the rule as to unforeseeable plaintiffs stated in § 281. It seems more likely, however, that it is the character of the contract or prospective interest itself which has led the courts to refuse to give it protection against negligence. They apparently have been influenced by the extremely variable nature of such relations, the fear of an undue burden upon the defendant's freedom of action, the probable disproportion between the large damages which might be recovered and the

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See also, 46 ALI Proceedings 205-22 (1969); W. Prosser, Law of Torts § 129 at 938-42 (4 ed. 1971); Note, Negligent Interference with Economic Expectancy: The Case for Recovery, 16 Stan.L.Rev. 664 (1964).

We recognize, however, that the rule enunciated in *Robins* and the broader concept that negligent interference with the performance of a contract does not state a cognizable claim have been the subject of severe criticism by many commentators. *See, e.g.*, 1 F. Harper & F. James,

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extent of the defendant's fault, and perhaps in some cases the difficulty of determining whether the interference has in fact resulted from the negligence conduct. What the reason may be . . . there is as yet no liability for negligent interference with the performance of a contract, or with a prospective contract relation.

Illustrations:

1. A has contracted to tow a barge owned by B between two ports. Before the contract can be performed, C negligently sinks the barge, and A is prevented from towing it, and so deprived of the profit to be made out of the towage fees. C is not liable to A.

Id. at 56. The Explanatory Notes further indicate that

Illustration 1 is taken from La Société Anonyme de Remorguage a Hélice v. Bennetts, [1910] 1 K.B. 243. In *accord* are Robins [Robins] Dry Dock & Repair Co. v. Flint, (1927) 275 U.S. 303 [48 S.Ct. 134, 72 L.Ed. 290] (charterer); Petition of Kinsman Transit Co., (2 Cir. 1968) 388 F.2d 821 (river blocked, ship unable to deliver cargo upstream); Louisville & Nashville R. Co. v. Arrow Transp. Co., (N.D. Ala.1959) 170 F.Supp. 597; Petition of S. C. Loveland Co., (E.D.Pa.1959) 170 F.Supp. 786 (plaintiff had contracted to discharge barge at a pier).

Id. at 60. *See also*, W. Prosser, Law of Torts § 129 at 938:

Interference with contract, which had its modern inception in "malice," has remained almost entirely an intentional tort; and in general, liability has not been extended to the various forms of negligence by which performance of a contract may be prevented or rendered more burdensome. [Footnote omitted].

The Law of Torts § 6.10 at 501-505 (1956);[5] Prosser, *supra*,

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5. In their treatise, Harper and James state:

It is believed that many of the cases which purport to deal with this question and much of the literature which discusses them have misconceived the problem and have beclouded rather than clarified the issues. Indeed, in most instances, the problem of negligent interference with contract relations seems to be wholly artificial.

Much of the confusion derives from the opinion of Justice Holmes in Robins Dry Dock & Repair Company v. Flint. . . .

With the emphasis . . . laid on the wrongdoer's knowledge or lack of knowledge of the contract, discussion of the *Robins case* has invariably been cast in the mould of negligent interference with contract relations. It is submitted that the issue of "knowledge" has been largely overemphasized on the one hand, and is largely irrelevant on the other.

In the first place, if "knowledge" were important, it is hard to understand why defendant should not be charged with knowledge that the plaintiff was or might well be a charterer entitled to the use of the vessel which he delivered to the dry dock to be repaired under a contract which the defendant had made with the owner. And if it be argued that the defendant would assume that the master of the vessel was acting for and on behalf of the owners, it might be a sufficient answer that such an assumption is hardly warranted in an industry where charter parties are common and vessels are, perhaps as frequently as not, operated by persons other than their owners. "Knowledge" of the existence of the contract or lack of it could hardly be decisive if the general principles of negligence are applicable. It should be enough to establish a prima facie case if the defendant, as a reasonable man, should have known of the likelihood of the existence of the contract and thereafter created an unreasonable risk of interfering with it. The analogy to negligent injury to persons is clear. Not only is it negligent to create unreasonable risks to persons whose presence is known but to those whom the actor has reason to expect in the area of his conduct and who thus may be exposed to the risk.

More important, knowledge on the part of the defendant that the ship was being operated by persons other than the owners would seem to be irrelevant, as having nothing to do

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with the defendant's primary liability. It is a long-standing rule of damages that recovery for damage tortiously caused to a chattel may include not only the cost of repairs but the value of the use of the chattel while it is undergoing repairs. A similar rule prevails in the case of damage to real estate which involves repairs and the loss of use. If there had been no charter party in the *Robins* case, there seems to be no doubt that the owner could have recovered for the loss of the vessel's use which resulted from the negligently damaged propeller. Again, if the damage had been done to the vessel while the charterer was in active operation of it, his recovery could be supported on analogy to old and unquestioned principles of law. The defendant should not be permitted to plead the jus tertii.

. . . . .

Following up the lead in Mr. Justice Holmes' opinion in the *Robins* case, most of the writers and commentators have treated the problem involved as one of negligent injury to contract relations, a new and novel problem to be dealt with in a way analogous to the treatment accorded the situation in Lumley v. Gye rather than a relatively simple variant of an old problem of damage to land or chattels in which there are multiple interests deriving from a conveyance or a contract.

1 F. Harper & F. James, *supra* at 501-505 (footnotes omitted).

In a recent article, Professor James has stated:

> It remains to be considered whether the present rule may be too broad—whether its sweep may exclude liability in some situations to which the pragmatic objection has no valid application. Take, for example, the case of a ship's charterer who loses its use, and even may have to pay hire, during the time when the ship is laid up for repairs necessitated by defendant's negligence. If there were no charter, the owner who lost the vessel's use could recover for that loss measured by its reasonable value. If the defendant were liable to the charterer instead, it would not be a wide and open-ended liability, but a finite one that the tortfeasor or his liability insurer would expect to pay under frequently occurring circumstances. There seems to be no valid reason why defendant should escape this ordinary item of damage just because the loss in this case happened to be suffered by one who had no proprietary interest in the ship. What has been called the pragmatic objection simply has no application. There are

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at 940 ("[n]o very satisfactory reason has been given for this refusal of a remedy in negligence cases."); 88 Harv.L. Rev. 444 (1974). Indeed, were this Court now free to write upon a *tabula rasa* and not constrained by the weight of precedent, we would reject the negligent interference with contract doctrine in favor of a negligence-causation-foreseeability analysis, such as that adopted by Chief Judge Kaufman in Petition of Kinsman Transit Co., 388 F.2d 821, 823-24 (2 Cir. 1968) [*Kinsman II*].[6] *See also*, Ira S.

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> some practical—or "pragmatic"—difficulties, but they are of a different nature and a lower order of magnitude. There are questions of proper parties, of the proper measure of damages, of the protection of defendant against multiple vexation and double liability, and of protection of the settlement process. All these difficulties, however, are readily solvable by familiar procedural devices. The presence of both the charterer and owner as parties plaintiff in the suit could be required, and this would answer proper parties and multiple vexation questions. The measure of damages, in any event, should be limited to reasonable value. Settlement in good faith with either party should be held to bar the other on the very appropriate analogy from the law of bailment.

James, Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal, 25 Vand.L.Rev. 43, 55-57 (1972). *See also*, Note, 16 Stan.L.Rev., *supra* at 689-93.

6. The *Kinsman* litigation arose from one of the most bizarre set of circumstances recorded in the federal case law. The facts, most briefly stated, are as follows: As the result of negligent mooring, the MacGilvray Shiras was torn loose from its moorings by drifting ice and sent crashing down the Buffalo River, where it crashed into a second ship, The Tewksbury. In turn, these two vessels were impelled by the current of the river against a bridge with such force that two towers of the bridge eventually collapsed. In addition, the two ships, which had been wedged together in the wreckage, "substantially dammed the flow [of the river], causing water and ice to back up and flood installations on the banks with consequent damage

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[to a point] . . . nearly three miles upstream." Petition of Kinsman Transit Co., 338 F.2d 708, 713 (2 Cir. 1964) [*Kinsman I*], cert. denied sub nom., Continental Grain Co. v. City of Buffalo, 380 U.S. 944, 85 S.Ct. 1026, 13 L.Ed.2d 963 (1965).

In *Kinsman I*, the various defendants sought to avoid the imposition of liability for the damages flowing from their negligent conduct, particularly the damages caused by the flooding of upstream landholders. They argued that such consequences were unforeseeable. Judge Friendly, writing for the Court of Appeals, disagreed. He stated that while "[f]oreseeability of danger is necessary to render conduct negligent," 338 F.2d at 724, it was not required that the defendants envision the precise harm resulting from their conduct before liability could be imposed.

> [W]here as here the damage was caused by just those forces whose existence required the exercise of greater care than was taken—the current, the ice, and the physical mass of the Shiras, the incurring of consequences other and greater than foreseen does not make the conduct less culpable or provide a reasoned basis for insulation.

Id.. While thus adopting a view that liability would lie despite the fact that the precise damages incurred were not foreseeable, Judge Friendly cautioned: "Somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity." *Id.* at 725.

The decision of the court in *Kinsman I* set the stage for Chief Judge Kaufman's subsequent decision in *Kinsman II*. In *Kinsman II*, two claimants sought to recover for accident-related additional expenditures necessary to fulfil various contractual obligations. In the course of rejecting these claims on foreseeability grounds, Judge Kaufman cast doubt upon the vitality of the *Robins* holding by stating:

> Judge Burke refused to confirm either the Gillies or the Farr awards made by the Commissioner. He reasoned that the evidence established that the damages to Cargill and Cargo Carriers were caused by negligent interference with their contractual relations. In the absence of proof that the interference was intentional or with knowledge of the existence of the contracts, he concluded recovery could not be grounded in tort. Robins Dry Dock and Repair Co. v. Flint, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927). We too deny recovery to the claimants, but on other grounds.

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> We do not encounter difficulty with Judge Burke's analysis because it lacks some support in the case law; instead, we hesitate to accept the "negligent interference with contract" doctrine in the absence of satisfactory reasons for differentiating contractual rights from other interests which the law protects. . . . Professors Harper and James suggest that the application of the doctrine is wholly artificial in most instances. Id. at 501. We therefore prefer to leave the rock-strewn path of "negligent interference with contract" for more familiar tort terrain. Cargill and Cargo Carriers argue broadly that they suffered damage as a result of defendants' negligence and we will deal with their claims in these terms instead of on the more esoteric "negligent interference" ground.
>
> Having determined our course, we nevertheless conclude that recovery was properly denied on the facts of this case because the injuries to Cargill and Cargo Carriers were too "remote" or "indirect" a consequence of defendants' negligence.
>
> . . . [W]e hold that the connection between the defendants' negligence and the claimants' damages is too tenuous and remote to permit recovery. "The law does not spread its protection so far." Holmes, J., in Robins Dry Dock, supra, 275 U.S. at 309, 48 S.Ct. at 135.
>
> In the final analysis, the circumlocution whether posed in terms of "foreseeability," "duty," "proximiate [sic] cause," "remoteness," etc. seems unavoidable. As we have previously noted, 338 F.2d at 725, we return to Judge Andrews' frequently quoted statement in Palsgraf v. Long Island R.R., 248 N.Y. 339, 354-355, 162 N.E. 99, 104, 59 A.L.R. 1253 (1928) (dissenting opinion): "It is all a question of expediency * * * of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."

388 F.2d at 823-25.

In view of the tenor of Judge Kaufman's remarks, *supra*, this Court is of the view that the Court of Appeals may well consider *Robins* to have been discarded *sub silentio* by the decision in *Kinsman*

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Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171-73 (2 Cir. 1968); In re Lyra Shipping Co., Ltd., 360 F.Supp. 1188, 1192-94 (E.D.La.1973); Chicago & Western Indiana R.R. Co. v. The Buko Maru Nos. 70 C 2250 and 70 C 1837 (N.D.Ill.1973), aff'd, 505 F.2d 579 (7 Cir 1974); *and see* the recent English case of Spartan Steel & Alloys Ltd., [1972] 3 All E.R. 557 (C.A.) (particularly the opinion of E. Davies, L.J. at 569).[7]

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11. Such approach was apparently adopted by Judge Cassibry in In re Lyra Shipping Co., 360 F.Supp. 1188, 1192-94 (E.D.La.1973). *Cf.*, Chicago & Western Indiana R.R. Co. v. The Buko Maru, Nos. 70 C 2259 and 70 C 1837 (N.D.Ill. June 19, 1973), aff'd 505 F.2d 579 (7 Cir. 1974). However, we believe it to be presumptuous for us to conclude that the Second Circuit has *sub silentio* overruled *Robins*, especially in light of the decisions of the Fifth Circuit, rendered after the decision in *Kinsman II*, which adhered to *Robins*. *See* Kaiser Aluminum & Chem. Corp. v. Marshland Dredging Co., 455 F.2d at 958 and J. Ray McDermott & Co. v. S.S. Egero, 453 F.2d at 1203-04.

Given this quandary, as well as our own attitude concerning the propriety of the *Robins* rule, we perceive two viable alternatives in the present case. The first is to deny the instant motion upon the authority of *Kinsman II* and the views of the commentators and certify the matter to the Court of Appeals pursuant to 28 U.S.C. § 1292(b). However, in view of the fact that the Court of Appeals retains discretion to decline to accept such an interlocutory appeal, we reject this alternative as unsound. *Cf.*, Slade v. Shearson, Hammill & Co., Inc., No. 74-1537 (2 Cir. Dec. 16, 1974). The second alternative, that which we choose to follow, is to grant the motion and enter a final, appealable judgment. By so acting, we will assure the parties a full and speedy review of the single legal issue presented, without need of extended proceedings in this Court. This will serve the interests of judicial economy and we urge the appellate courts to resolve the matter and provide direction to the district courts for the resolution of this and other similarly situated controversies.

7. The recent Harvard Law Review note points up the defects in premising the present rule on nonforeseeability grounds in these words:

> At the core of the court's analysis [in Union Oil Co. v. Oppen, 501 F.2d 558 (9 Cir. 1974)] is an assumption that

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> the rule of nonliability was adopted in order to limit recovery to reasonably foreseeable consequences of negligent conduct. This assumption is not borne out by case law. When, for example, the power line of a factory is negligently cut, loss of profits would appear to be just as foreseeable as physical damage to items within the factory, yet only plaintiffs suffering physical damage are permitted to recover. Indeed, the absence of any direct relationship between foreseeability and the nonliability rule is illustrated by a recent case in which an English court expressly assumed that the closing of local cattle markets was a foreseeable result of the escape of a virus from defendant's laboratory, but denied recovery to the owners of the markets. Moreover, the exceptions to the general rule of nonliability which were discussed by the *Oppen* court do not appear to be grounded in a higher level of foreseeability but, rather, seem responsive to specific social policies. Finally, a rule based on foreseeability would be a superfluous addition to the law of torts; where plaintiff's injury is not reasonably foreseeable, the court can refuse to permit recovery on that ground alone. Thus, the basis for denying recovery for negligently caused economic loss must lie elsewhere than in the problem of foreseeability.

88 Harv.L.Rev. at 47-48 (footnotes omitted). In like fashion the student note contained in 16 Stan.L.Rev. at 692 states

> that the courts may indeed be applying, *sub silentio* and with heavy emphasis on the progressive difficulty of establishing foreseeability as economic injury becomes less immediately connected with injury to some tangible asset, some version of the balancing-of-interests test suggested in the foregoing sections. But even if this is so, the aggregate results of decided cases will be undesirably influenced by the tendency of many courts to emphasize unnecessarily "lack of foreseeability," perhaps because they feel that economic interests are not as important as tangible interests. But most of the cases in this area involve business enterprises, and the economic relations are usually as important as and often more important than its chattels. For the foregoing reasons foreseeability of injury is a proper requirement which should be applied as a test here in as broad and extensive a fashion as it is in other areas of negligence law.

This author concluded that

> The rule against recovery for negligent interference with economic expectancy should be relaxed. The determination

(footnote continued on next page)

Memorandum Decision

In the instant case, however we feel bound by the Supreme Court's decision in *Robins*. We believe that the *Robins* decision must be adhered to by the lower federal courts, at least in instances involving the factual contours of that case, namely the negligent interference with a time charterer's contract rights by third parties, until such time as the Supreme Court directs otherwise. A *nisi prius* judge should not overturn the non-constitutional precedents established by the Supreme Court because as the Second Circuit has aptly put it, "we continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decision, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom." Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003, 1005 (2 Cir. 1970) cert. denied, 400 U.S.

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of whether recovery should be permitted in particular cases will involve the weighing of several factors. The prerequisites of negligent conduct, actual causation and foreseeability of harm must be satisfactorily established. The recovery should follow if it is indicated by a balancing of the interests in favor of recovery, which include the plaintiff's interest in his economic expectancy and the social interests in the stability of economic relations and discouragement of negligent conduct, and the interests against recovery, including the interests of defendant and society in a maximum of freedom of action. The social interest in allocating loss to the better loss distributor may appear on either side of the scale, will often be irrelevant, and probably must be applied to classes of fact situations rather than to each case, but it should be included in this balancing test where it is appropriate. Only when this rule against recovery has been eliminated will economic expectancies receive the protection which writers have urged, which the courts are beginning to grant, and which their social importance justifies.

Id. at 693-94.

Judgment

1001, 91 S.Ct. 462, 27 L.Ed.2d 452 (1971) *See also*, Rederi A/B Soya v. Evergreen Marine Corp., 1972 A.M.C. 1555, 1566 (E.D.Va.1971). No recent decision of the High Court has presaged the doom of *Robins*, and, therefore, we adhere to it in the matter at bar.

For all of the reasons aforestated, the defendants' motion is hereby granted and the Clerk of the Court is hereby directed to enter judgment dismissing the complaint as to all defendants.

It is so ordered.

Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 74-1899 (J.M.C.)

[SAME TITLE]

Defendants having moved the Court for an order dismissing the complaint for failure to state a claim upon which relief can be granted, and the said motion having come on to be heard before the Honorable John M. Cannella, United States District Judge, and the Court thereafter on April 8, 1975, having handed down its memorandum opinion granting the said motion, and directing the Clerk to enter judgment, it is,

ORDERED, ADJUDGED and DECREED: That defendants M/V MARATHONIAN, her engines, etc., and EUROPA SHIPPING CORPORATION have judgment against plaintiff FEDERAL

Notice of Appeal on Behalf of Federal Commerce & Navigation Company, Ltd.

COMMERCE & NAVIGATION CO., LTD., dismissing the complaint.

Dated: New York, N.Y.
April 23, 1975

/s/ RAYMOND F. BURGHARDT
Clerk

Judgment and Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 198—September Term, 1975

(Argued December 3, 1975 Decided December 29, 1975.)

Docket No. 75-7274

FEDERAL COMMERCE & NAVIGATION COMPANY, LTD.,

Plaintiff-Appellant,

v.

THE M/V MARATHONIAN, her engines, etc. and EUROPA SHIPPING CORPORATION,

Defendants-Appellees.

Before:

KAUFMAN, *Chief Judge,*
SMITH and FEINBERG, *Circuit Judges.*

Appeal from dismissal by the United States District Court for the Southern District of New York, John M. Cannella, *Judge,* of action by time charterer of vessel against second vessel for damages suffered as a result of a collision. 392 F. Supp. 908 (S.D.N.Y. 1975).

Affirmed.

[Appearances deleted]

PER CURIAM:

Federal Commerce & Navigation Company, Ltd., time charterer of the M/V ROLWI, sued in the district court for the Southern District of New York for damages of some $700,000 sustained while the ROLWI was laid up as a result of damage sustained in a collision with the M/V MARATHONIAN, owned and operated by defendant Europa Shipping Corporation.

The district court, John M. Cannella, *Judge*, in a considered and thorough opinion reluctantly dismissed the action as not sustainable in the light of *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303 (1927), which denied relief for damages sustained by a time charterer. 392 F. Supp. 908 (S.D.N.Y. 1975). We find no error and affirm the judgment.

Appellant contends that *Robins* is unsound, has been eroded and should not be followed, and in the alternative that intentional wrongdoing on the part of defendant takes the case out of the rule of *Robins* based on negligent interference with contract.

The short answer to the second claim is that excessive speed in foggy conditions falls short of intentional damage.

The first claim is somewhat more substantial, for the basis for denial of relief to the time charterer in *Robins* has come under strong scholarly criticism. See F. James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 Vand. L. Rev. 43, 55-57 (1972),[1] 1 F. Harper & F. James, *The Law of Torts*

[1] Take . . . the case of a ship's charterer who loses its use, and even may have to pay hire, during the time when the ship is laid up for repairs necessitated by defendant's negligence. If there were no charter, the owner who lost the vessel's use could recover for that loss measured by its reasonable value. If the defendant were liable to the charterer instead, it would not be a wide and open-ended liability, but a finite one that the tortfeasor or his liability insurer would expect to pay under frequently occurring circumstances. There seems to be no valid reason why defendant should escape this ordinary item of damage just because the loss in this case happened to be suffered by one who had no proprietary interest in the ship.

25 Vand. L. Rev. at 56.

§6.10, at 501-05 (1956); see also W. L. Prosser, *Law of Torts* §129, at 939, 940 (4th ed. 1971).

We are unable, however, to discern any indication that the Supreme Court has moved away from the *Robins* rule. The only case since *Robins* cited to us, *Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U.S. 394 (1935), explicitly distinguished *Robins*, and the admiralty texts recognize the continued force of the rule. See *e.g.*, Poor, *Charter Parties and Ocean Bills of Lading* 25 (5th ed. 1968); Scrutton, *Charterparties and Bills of Lading* 49 (18th ed. 1974).

The *Robins* rule appears to be based on a contract theory, denying relief to one injured by negligent interference with contract, although an effort is also made by appellee to justify the rule on the basis of remoteness of injury. If free to do so, we might question whether at least the damage to the principal time charterer is not so reasonably to be expected as to justify recovery. See *Petition of Kinsman Transit Co.*, 388 F.2d 821, 823-24 (2d Cir. 1968). But there are arguments to the contrary, such as the difficulty in drawing the line in a field where successive subcharters are not uncommon and rapid and wide fluctuations of rates of charter hire not unknown.

In any case, "the Supreme Court should retain the exclusive privilege of overruling its own decisions, save

perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom." *Salerno* v. *American League of Professional Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970).[2] The judgment is affirmed.

[2] See also, Judge Learned Hand dissenting in *Spector Motor Service, Inc.* v. *Walsh*, 139 F.2d 809, 823 (2d Cir. 1943, 1944), *vacated and remanded*, 323 U.S. 101 (1944):

> Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant. . . .

Decision on Damages

CHICAGO AND WESTERN INDIANA RAILROAD COMPANY,

v.

MOTORSHIP BUKO MARU
(Nos. 70 C 2259, 70 C 1837)

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, E.D.

Decision on Damages

This cause comes on to be heard on motions of several railroads to intervene and the motions of all railroads to determine damages sustained by them as the result of defendant's collision with a bridge which they all used. The defendant Sanko S.S. Co. Ltd. no longer opposes intervention by the petitioning railroads, and those motions are hereby granted.

Liability of the defendant Sanko S.S. Co. Ltd., owner of the Motorship Buko Maru, was fixed by this court's Decision entered March 2, 1972 after a trial on that issue only. 348 F.Supp. 549 (N.D.Ill. 1972). Thereafter the parties entered into stipulations filed October 10, 1972 and March 9, 1973 settling the reasonable amount of damages sustained by each railroad excepting the Elgin, Joliet & Eastern. These stipulations involved a great amount of work by the attorneys and are gratefully approved and adopted by the court.

The issue to be decided at this juncture is which of the petitioning railroads is entitled to damages. The defendant Sanko does not dispute the claim of the owner railroad, plaintiff Chicago & Western Indiana Railroad Co. The

defendant does deny, however, that three railroads which own stock in the Chicago & Western Indiana R. Co. are entitled to damages (specifically the Chicago & Eastern Illinois, the Erie & Lackawanna, and the Monon). These are referred to as the "proprietor railroads"; the two other railroad owners of the Chicago & Western Indiana make no claim for damages. The defendant has also denied that three contract users of the bridge are entitled to damages. These are the Elgin, Joliet & Eastern, the Belt Railroad of Chicago and the Chesapeake & Ohio, referred to as the "tenant railroads".

The claimants base their complaints on 46 U.S.C. § 740 which was enacted in 1948. This section provides in pertinent part as follows:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consumated on land. In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done or consummated on navigable water . . .

This statute did nothing more than extend the reach of admiralty jurisdiction and did not take these claims out of that body of jurisprudence. Louisville & Nashville R. Co. v. Arrow Transportation Co., 170 F.Supp. 597 (N.D. Ala. 1959).

The legal title to the bridge is owned by the Chicago & Western Indiana R. Co., and the proprietor railroads own all of the stock of that railroad in equal amounts. The

Chicago & Western Indiana is not an operating railroad but merely owns the bridge and tracks which connect the bridge with points in Illinois and Indiana. All of its expenses and income (or losses) are distributed among the proprietor railroads, so that the Chicago & Western Indiana has no taxable income. See 26 U.S.C. § 281. Thus it is more in the nature of a title holding company or a mutual fund than it is a separate, legally distinguishable entity. We fail to see why its existence should stand in the way of the users of the bridge to collect for damages sustained as the proximate result of the Buko Maru's wrongful act. These claimants sue not as stockholders or as owners (except perhaps in a loose equity sense) but as persons with a proprietary or a contractual right to use the bridge pursuant to Federal laws and regulations.

The controlling rule of law in our opinion is whether the damages were reasonably forseeable. This principle is laid down and thoroughly analyzed with respect to various categories of admiralty claims by Judge Friendly in Petition of Kinsman Transit Co., 338 F.2d 708 (2d Cir. 1964). A ship broke loose during a flood and created havoc as it careened downstream. The court held that damages to a bridge, to adjacent landowners, and to the owners of ships and cargoes were properly recovered from the negligent parties. The court applied the proximate cause doctrine of Palsgraf v. Long Island Railroad Co., 284 N.Y. 339, 162 N.E.2d 99 (1928) which we believe to be the sound approach. Later, however, in Petition of Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968) the court held on the same facts that the owners of ships which were blocked by the resultant ice jam and could not deliver their cargoes when scheduled could not recover because their damages were "too tenuous and remote".

There can be no question in the case at bar that the interruption of claimants' traffic was a foreseeable consequence of shutting down the bridge. This principle is not inconsistent, in principle, with the leading case of Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927). Justice Holmes based this decision on the libellant's lack of protectible interest in a ship which was not ready for the libellant's charter, but his opinion relies heavily on the fact that the defendant did not know of the charter until after the damage was done. The court stated at 275 U.S. p. 308:

> The question is whether the respondents have an interest protected by the law against unintended injuries inflicted upon the vessel by third persons who know nothing of the charter. If they have, it must be worked out through their contract relations with the owners, not on the postulate that they have a right in rem against the ship.

The claims in the case at bar are also supported by Petition of Canal Barge Co., 323 F.Supp. 805 (N.D.Miss. 1971), affirmed, 480 F.2d. 11 (5th Cir., 71-2226, March 30, 1973). In that case, Terminal Railroad Association of St. Louis owned all the stock of the title holder of a bridge. Terminal recovered damages from a barge owner who caused the users to incur detour expenses. Terminal collected not only for its own expenses but for the expenses of its "customer" railroads who incurred detour expenses of various kinds. Relying on decisions other than the foregoing authorities, the court allowed recovery in admiralty by the claimant for all damages caused by the negligent barge owner. The distinction between proprietary and tenant railroads did not directly arise but the latter group recovered through Terminal.

Defendant relies on Louisville & Nashville Railroad v. Arrow Transportation Co., supra p. 3, which denied recovery to a tenant or mere user railroad. The court found no "proprietary" interest for recovery under Section 740, purporting to follow Robins Dry Dock, above p. 4, and Alabama tort law. We do not believe this case is sound law today, at least in Illinois, in view of the rather dramatic advances in tort liability which have occurred since Justice Holmes found no liability for the negligent interference with unforseen contractual relationships.

Defendant has raised other points involving possible double recovery, and the precise interpretation of the stipulation, but these are of no merit. We therefore find and conclude that all of the claimant railroads are entitled to recover and will enter a judgment in favor of each of them upon presentation of a proper order agreed to as to form. The question of interest and the amount of damages sustained by the Elgin, Joliet & Eastern is reserved for future decision.

This case will be called for a status report and presentation of a judgment order on Monday, June 25, 1973 at 10 a.m.

Enter:

/s/ THOMAS R. MCMILLEN
Judge, U.S. District Court